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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM GRAMMER,

*Petitioner*

v.

PATTERSON SERVICES, INC.,

*Respondent*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Whether a federal appellate court, in reviewing a jury's findings of negligence, is precluded by the Seventh Amendment from ignoring the substantial evidence supporting the jury's verdict and entering a judgment NOV contrary to the rules of the common law.

2. After the Circuit Court's NOV, Petitioner Grammer made a timely request for new trial, which was lodged in three places: in his petition to the Circuit Court for rehearing; in his motion to amend the mandate for new trial or remand to the District Court to determine if new trial should be granted; and in his motion for new trial in the District Court. *Did the Circuit Court's refusal to grant a new trial or remand for the District Court's decision deny Grammer his constitutional rights to trial by jury and common law review under the Seventh Amendment; if not was the denial of new trial an abuse of discretion under Federal Rule of Civil Procedure 50(d)?*

## LIST OF PARTIES

The parties to the proceedings below were: Petitioner William Grammer; Respondent Patterson Services, Inc.; Gator Hawk, Inc.; and Boco of Lafayette. The sole respondent here is Patterson Services, Inc.

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OCTOBER TERM, 1988

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***PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT***

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WILLIAM GRAMMER respectfully petitions that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this case entered on December 28, 1988, and the ruling denying both rehearing and new trial entered January 9, 1989.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A *infra*, 1a-18a) is reported at 860 F.2d 639.

The opinion of the District Court (App. B, *infra*, 1b-6b) is not reported.

## JURISDICTION

This is a diversity case arising in Louisiana. Judgment of the United States Court of Appeals for the Fifth Circuit was entered December 28, 1988. A timely petition for both rehearing and new trial was denied on January 9, 1989. The time to file for certiorari was extended by order of Justice White until April 28, 1989. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

The Seventh Amendment to the Constitution of the United States states:

> **In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.**

Rule 50 (d) of the *Federal Rules of Civil Procedure* concerning new trial after a Court of Appeals has entered a judgment notwithstanding the verdict:

> **If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the**

**judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.**

## STATEMENT OF THE CASE:

Petitioner Grammer almost got his head knocked off when a piece of oilfield pipe exploded while it was under a high pressure test with Grammer's head right next to it. But the Fifth Circuit took his money judgment away from him NOV. It concluded that he had not made out for the jury a submissible case of operational control nor authorized conduct, the critical issues in the case. This was necessary because the respondent Patterson claimed it was using an independent contractor, Gator Hawk, to test the pipe.

If so, Respondent Patterson would be liable to Grammer if:

(1) It had operational control of the relevant ways and means of the test that led to Grammer's injuries; or,

(2) It expressly or impliedly authorized (ordered) the relevant features of the test procedure that injured him.

The case was a jury question to the bone: reasonable people could not differ about that.

The verdict was supported by a patently clear preponderance of the evidence. The factual questions were so deeply within the province of the jury that the Circuit Court's reversal was not merely judicial error, but a mistake of

constitutional magnitude denying Grammer the jury trial and review guaranteed him by the Seventh Amendment.

That Amendment may not guarantee jury trial to the extent of assuring immunity from mere judicial error in overturning a verdict.

But here the Circuit Court's error was of such gravity that it not merely invaded the province of the jury, it completely usurped it.

This case was tried by a three-man jury. The Circuit Court did not review the evidence; it tried the case. It tried it just as much as if the Constitution provided that it should have appellate jurisdiction over "both the law and the facts." The result is dismaying.

The District Court had denied Patterson directed verdict and NOV because "The jury could fairly conclude from all of the evidence that the defendant's actions constituted operational control of Gater Hawk's pipe testing and that defendant's actions were negligent and a proximate cause of plaintiff's injuries." (App. B, 5b.)

After reversing the judgment of the District Court, it then remanded for further proceedings consistent with its opinion. In his petition for rehearing (App. C), Patterson had asked in the alternative for new trial; the petition for rehearing was denied without comment about new trial. So, Grammer filed a motion to recall and amend the mandate to provide for new trial under Rule 50(d); on the chance that the mandate allowed the trial court to do that, Grammer also moved in District Court for new trial.

The Circuit denied the motions about new trial (App. D); as a result the District Court refused to consider new trial. (App. E)

CIRCUIT COURT FINDINGS:

The Circuit Court found that the proofs were these, 860 F.2d 641, et seq. (App. A, *infra*, 5a-13a)

> "Patterson is in the business of leasing oilfield pipeline to drillers. Before delivering pipe to lessees, Patterson tests each joint (piece) to ensure it can withstand the anticipated pressures encountered while conducting downhole drilling operations. Not in the business of pipe testing itself, Patterson contracts with independent contractors to conduct such inspections. During the period pertinent to our review, Patterson had entered into a lease agreement with Gator Hawk, Inc. (Gator Hawk) by which Gator Hawk agreed to bring its Automatic Hydrostatic Internal Tester (the AHIT machine) to Patterson's yard in Morgan City, Louisiana where Gator Hawk crews would conduct the testing procedure. Although remaining in possession of the AHIT machine, Gator Hawk agreed to travel to Morgan City at Patterson's request to operate and maintain the machine and *"to provide such labor, supplies and other services . . . as may be required by Lessee from time to time."* Pl. Ex. No. 2, p. 2.
>
> * * *
>
> The AHIT machine, if functioning properly, would then *automatically* unscrew its plugs from the pipe and prepare to roll the next piece into testing position.

"Some months before Grammer's injury, a Gator Hawk testing session of Patterson's pipe resulted in a particularly high rejection rate due to faulty primary seals. It was at this time that, *upon questioning the machine operation*, Patterson first learned about the AHIT machine's technical operations including the standard practice of torquing the plugs only to the extent necessary to engage the primary seal. To improve their pass rate, Patterson instructed Donnie Castille, the operator, *to maximize the AHIT machine's torque* which had the effect of tightening the plugs onto the pipe ends to a greater degree thereby engaging the second and third seals in addition to the primary seal. The escape valves or weepholes in the plugs rendered it physically impossible to torque the plugs beyond the primary seal; *therefore, Patterson instructed Gator Hawk to remove the weepholes so the AHIT machine's maximum torque could be utilized.*

"Although hotly contested by the parties, the reason underlying Patterson's request to maximize torque seems clear. Patterson needed to devise a test less stringent than Gator Hawk's normal procedure so that more of its pipe would pass the test. By maximizing torque and engaging all three seals, defects in the primary seal were less likely to surface; consequently, more pipe passed the inspection leaving Patterson with a larger leasable inventory.

> **"On November 4th and 5th, 1981, Patterson's pipe tested extremely poorly. Based on the instructions given months before, Donnie Castille began torquing the AHIT machine's plugs beyond the pipe's primary seals. Because the plugs were connected so tightly to the pipe ends, the AHIT machine *was unable to automatically disengage the plugs after the joint had been tested,* Donnie Castille instructed Grammer to assist the disengaging process by placing a wrench on the pipe to secure it while the machine "backed off" the plugs. On November 5th, Grammer approached the AHIT machine to apply the wrench a few seconds before the water pressure had been released. The pipe ruptured spewing highly pressurized water into Grammer's face."** [Emphasis added.]

THE NOTE OF EVIDENCE:

Thus, the note of evidence, as indicated by the Circuit Court, was conclusive and uncontradicted that Patterson tested all of its pipe before letting it go out to customers. For years during good times Patterson had a standard test that would produce more or less a "standard" number of failures or "rejects." In profitable times, Patterson was content to tolerate this number of rejects, some of which manifested their defect through high-pressure explosion during the test.

But to increase profits when hard times hit, it ordered Grammer's employer, Gator Hawk, to run the test at maximum torque and with safety vents ("weepholes") closed. This produced fewer rejects and the customers would never know. But the laborers could not longer stand clear of the machine while under pressure because it could no longer automatically uncouple the pipe.

Gator Hawk was running the test purportedly as an independent contractor.

Everybody knew or was charged with knowledge that this new test was highly dangerous to the laborers involved. Gator Hawk and Grammer knew it. (He was found guilty of contributory negligence.) Patterson knew it or certainly should have known it, and was bound to know it under the law. All the workers knew it was like working with their heads close to a ticking bomb. (Maximum torque was nine fold the recommended tightness.) Death or injury were a statistical certainty; not if but when it would occur. One purpose of the automated feature was to prevent this type casualty by making manual uncoupling unnecessary.

Before pressure was released, the laborers had to stand near the pipe to help release pressure by manually unscrewing the pipe. But everyone undertook this risk because Gator Hawk needed Patterson as a customer; and Grammer needed his job.

Patterson's orders dealt with ways and means, how to do the test, not merely results. Patterson laid it on the line: *We have got to have fewer rejects; maximize torque; close the safety vents; and that will do it.*

**THE FIFTH CIRCUIT'S RULING:**

Although Patterson authorized (ordered) the test to be carried out in this fashion, specifying maximum torque, specifying safety vents closed, the Circuit Court apparently concluded that there was no liability because there was no evidence that Gator Hawk *had warned Patterson* that the

workmen would have to get dangerously close to the pipe 860 F.2d 671, (App. A, *infra*, 15a-16a):

> "Certainly, Gator Hawk was not free to do any work it wished. Patterson's instructions expressly designated a new, possibly sub-standard test which reflected a variation in Gator Hawk's normal test. Gator Hawk was bound by the lease agreement to perform this additional service. However, Gator Hawk was free to, and did, conduct the testing *in its own way*. No evidence suggests that Patterson designated how the Gator Hawk crew was to stack the pipe, inject water pressure, retain water pressure, or engage and disengage pipe from the AHIT machine. Rather, it is uncontroverted that Gator Hawk's Donnie Castille instructed Grammer on all matters including the use of the wrench to loosen the plugs from the pipe ends.
>
> "The evidence overwhelmingly indicates that Patterson personnel participated to a very limited extent in the testing procedure. *Michael Kern, the Patterson yard dispatcher, testified that Patterson personnel had been instructed to stay away from the testing area because it was a dangerous procedure* about which his men knew nothing. Donnie Castille testified that only he operated the machine and that "there were no Patterson hands working on this machine." *The record is entirely devoid of any suggestion that Gator Hawk informed Patterson that the AHIT machine was unable to automatically disengage its plugs from the pipe ends or that*

***Patterson knew the Gator Hawk crew was assisting this process by use of a hand held wrench*. Thus, although not specifically raised by Grammer on appeal, this evidence nullifies any implicit contention that Patterson "expressly or impliedly authorized" or was aware of the dangerous activity.**

[A point actually in Grammer's favor: Patterson conceded that its employees should not have given such orders, obviously because of their ignorance which might make such orders dangerous:

> Q Now, do you know whether or not Patterson ever told Gator Hawk's operators or managers as to how much torque they wanted applied to the pipe as they were testing it?
>
> A That was within the realm of Gator Hawk's responsibility. If any of our people ever did tell them they should not have.]

* * *

> **Instructions which appear to impose operational control over a contractor's activities are at times more appropriately characterized as a principal's shorthand way of designating a desired outcome. Language itself is not dispositive. Rather, such instructions must be analyzed in the context in which they are imparted. *Having viewed the evidence as a whole, we conclude that Patterson's directions merely designated the type of test to be conducted rather than the method to conduct it. As a matter of law, the instructions did not constitute operational control over the testing procedure. We hold that the district court erred in denying Patterson's motion for judgment notwithstanding the verdict on the issue of operation control."*** [Emphasis added.]

Patterson's position was patiently explained to the jury by its counsel:

> **"Now, that may sound confusing, but what I'm trying to say is that what happened was supposed to happen under the circumstances. It failed . . . You may wonder why I didn't call a bunch of witnesses. There is really no need to. What happened is what is supposed to happen. The man was just there and he wasn't supposed to be there and I didn't have any control over that. Do I need to call a bunch of people to prove that?"** (Tr. p. 564, et seq.)

Not one word about the lack of actual warning or actual knowledge brought home to Patterson.

Patterson's orders had turned the AHIT machine from merely a noisy piece of equipment into a lethal weapon. But the Circuit Court apparently concluded that there was no liability because Patterson did not dictate every moment every detail of every move of the entire test procedure while Gator Hawk protested the danger every breath.

**THE CIRCUIT COURT'S CONCLUSIONS OF LAW:**

But the Fifth Circuit found the applicable law to be at least this favorable:

> ". . . **a principal may be liable for the acts of an independent contractor 'over which it has exercised operational control or which it has expressly or impliedly authorized.' "** 860 F.2d 641 (App. A, 7a)

Moreover, the Circuit Court had previously held such control existed where "the contractor is not entirely free to do the work in his own way." ***Wallace v. Oceaneering International***, 727 F.2d 427 (5th Cir., 1984); ***Ainsworth v. Shell Offshore Company***, 829 F.2d 548 (5th Cir., 1987).

The Fifth Circuit had also previously embraced the rule of law that where a principal exercises operational control, he has a duty to discover and remedy hazards created by acts of his independent contractors. It cited its own decision of ***Hawkins v. Evans Cooperage Co., Inc.***, 766 F.2d 904 (5th Cir., 1985), at page 908:

> **"Moreover, a principal who exercises no operational control has no duty to discover and remedy hazards created by acts of independent contractors."**

(*A fortiori*, where he *does* exercise operational control, he *is* under a duty to discover such hazards.)

Finally, the Circuit Court also concluded that the proper definition of operational control was this:

> **"The term "operational control," as employed by this Circuit and Louisiana courts, can be traced to the *Restatement* which provides in part that *"if the employer of an independent contractor retains control over the operative detail of doing* ANY PART OF THE WORK,*" he may be subject to liability for the offenses of his independent contractor. *Restatement* (Second) of Torts §414 comment a (1965) (emphasis added).** [Our emphasis added also.] 860 F.2d 644, (App. A, *infra*, 13a.)

As for Patterson's intent, the Circuit Court expressly found (860 F.2d 645) (App. A, p. 15a):

> **Patterson's instructions expressly designated a new, possibly substandard test which reflected a variation in Gator Hawk's normal test. Gator Hawk was bound by the lease agreement to perform this additional service.**

**REASONS FOR THESE EXCEPTIONS IMPOSING LIABILITY ON PATTERSON:**

As ***Prosser and Keeton on Torts*** (5th Ed., 1984) sums the point up, at page 510:

> **In the first place, quite apart from any question of vicarious responsibility, the**

> **employer may be liable for any negligence of his own in connection with the work to be done. * * * So far as he in fact gives directions for the work, furnishes equipment for it, or retains control over any part of it, he is required to exercise reasonable care for the protection of others . . . .**

In finding that Patterson's direct orders for maximum torque and closed safety vents were not operational control, the Circuit Court clearly usurped the function of the jury. For otherwise the Circuit Court's own definitions of operational control would have no evidential satisfaction unless the principal stood over the supposed independent contractor twenty-four hours a day directing every move the contractor made despite the latter's protest and warning of the danger in carrying out the principal's orders.

Patterson expressly ordered the dangerous activity; the jury could lawfully find under the Circuit Court's own rulings of law that Patterson had or should have had knowledge of the danger involved.

By contract "to provide such labor, supplies and other services . . . as may be required by lessee [Patterson]," Pl. Ex. No. 2, p. 2, Gator Hawk had to do whatever Patterson told it to do.

The Circuit Court's opinion shows on its face that the questions of operational control or authorized activity were manifestly jury questions.

This is not an advocate's argument of the testimony; it is the Circuit Court's *own deliberate interpretation*.

The Seventh Amendment simply does not countenance such a patently clear invasion of the jury's province.

Otherwise, trial by jury is a meaningless gesture, a mere warm-up for the real thing in Circuit Court. ***Mercer v. Theriot***, 377 U.S. 152 (1964).

**REASONS FOR GRANTING THE WRIT:**

I. The Circuit Court's reversal NOV of the District Court's judgment which was based upon a note of evidence that manifestly made the case a jury question is a direct impairment of Grammer's rights to a trial by jury and common law review under the Seventh Amendment. The reversal conflicts with the silent but clear decision of this Court in ***Galloway v. United States***, 319 U.S. 372 (1943);

The Seventh Amendment provides in part:

> . . . **the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.**

We accept the Circuit Court's interpretation of the Louisiana law as we must; any error in it would not merit certiorari.

But the factual case was not close for the Circuit Court. Reasonable judges could not differ over whether these factual issues were jury questions. This, under the Circuit Court's *own* interpretation of the evidence and *own* conclusions of the law which clearly show that operational control does not require that the principal exercise absolute tyranny over the contractor every moment of the work; nor that every irrelevant act of the work be under his express direction. Only the relevant acts that led to injury count.

STANDARD FOR SUBMISSION:

This Court stated the essence of the standard of proof for a case submissible to a jury in ***Galloway v. United States***, *supra*, 319 U.S., at 395:

> **Whatever may be the general formulations, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.**

Furthermore,

> **Once an evidentiary basis becomes apparent, the appellate court's function is exhausted, it being immaterial that that court might draw a contrary inference or feel that another conclusion is more reasonable.** ***Lavendar v. Kurn***, 327 U.S. 645 (1946), at 653.

The Fifth Circuit's correlary of application is this:

> **On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence–not just that evidence which supports the non-mover's case–but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand,**

> **if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach differenct conclusions, the motions should be denied, and the case submitted to the jury. *Boeing Company v. Shipman*, 411 2d 365 (1969) at 374.**

From the outset the American people have demanded not only trial by jury but common law review in no uncertain terms and in concrete detail. The demand was prompt and strong:

> **If it were true that the rule [concerning summary judgments] deprived the plaintiff in error of the *right* of trial by jury, we should pronounce it void without references to cases. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902), at page 122.**

So was the protection given it. ***Slocum v. New York Life Ins. Co.***, 228 U.S. 364 (1913), at 377:

> **The amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargments of the power of re-examination existing under the common law, and to that end declares that "no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Baltimore and Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935), at page 657.**

Indirect impairment of the right to jury trial may take the form of a judgment NOV where the jury question is patent.

So the Seventh Amendment limits specifically how such a verdict shall be reviewed: Where reasonable judges would not differ that a party has made out a substantial case or defense, a Circuit Court's NOV presents a Constitutional question. *Galloway v. United States*, 319 U.S. 372 (1943).

Here Grammer proved that Patterson retained "control over the operative detail of doing *any part of the work*" relevant the casualty.

Under the Circuit Court's *own* interpretation of that law, the fact that Patterson did not have express warning of the danger brought home to it is immaterial since Patterson is charged with knowledge under the Circuit Court's own conclusions of law in ***Hawkins***, supra, 766 F.2d 904 (5th Cir., 1985).

Patterson's orders created a substantial case of relevant operational control.

If this case does not present a jury question of operational control or authorized act, then just what would, under the Circuit Court's own ruling case law? What would it take for Patterson to have operational control here? Surely it is something short of the total relationship of master and servant; otherwise, there would be no reason for this exception to the general rule of principal and independent contractor *since the supposed exception would only work in the situation where that relationship has been totally converted into one of master and servant invoking respondeat superior anyhow; making both actual and constructive knowledge irrelevant.*

(The Circuit Court kept treating *Grammer's* case as one between *Gator Hawk* and Patterson, not *Grammer* and Patterson; warning brought home to Patterson by Gator Hawk would only be relevant in a case by Gator Hawk against Patterson, for damages to the AHIT machine, for example; not in a case by a third-party, such as Grammer.)

**FUNDAMENTAL ATTACK UPON JURY TRIAL:**

The Circuit Court's ruling here is no mere attack upon the mechanical frills of jury trial.

The Circuit Court has re-examined jury findings here in a way other than that allowed by the common law: It has simply turned a jury question into a point of law by grossly erring concerning the sufficiency of the testimony. This is exactly what the language of the Seventh Amendment was intended to prevent.

The District Court's conclusions concerning the testimony were clearly right; the Circuit Court's, clearly wrong. It's error is sufficiently grave to invoke the protection of the Seventh Amendment. If the Circuit Court's NOV is a "mere judicial error" presenting nothing for this Court's review, then the Seventh Amendment is simply out of business. Any verdict may be lawfully overturned by appellate review without constitutional consequences. ***Colgrove v. Battin***, 413 U.S. 149 (1973).

The Seventh Amendment's restrictions concerning re-examination of facts deals "exclusively with the prohibition contained in that clause against the indirect impairment of the right of trial by jury through judicial re-examination of fact findings of a jury other than as permitted in 1791." ***Colgrove v. Battin***, 413 U.S. 149 (1973), at 153; ***Baltimore & Carolina Line, Inc. v. Redman***, 295 U.S. 654 (1935); ***Parsons v. Bedford***, 3 Pet. 433 (1830).

As Chief Justice Rehnquist stated:

> **"Just as the principle of separation of powers was not incorporated by the Framers into the Constitution in order to promote efficiency**

> or dispatch in the business of government, the right to a jury trial was not guaranteed in order to facilitate prompt and accurate decision of lawsuits. The essence of that right lies in its insistence that a body of laymen ***not permanently attached to the sovereign*** participate along with the judge in the fact finding necessitated by a lawsuit. And that essence is as much a part of the Seventh Amendment's guarantee in civil cases as it is of the Sixth Amendment's guarantee in criminal prosecutions. * * * Jurors bring to a case their common sense and community values; their very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eyes."
> [Emphasis added.]

***Parklane Hosiery Co., Inc., v. Shore***, 439 U.S. 322 (1979), Justice Rehnquist, dissenting, at 348, et seq.

As ***Slocum***, above, recalled long ago:

> The Constitution of the United States, as originally adopted, conferred upon this court, by art. 3, §2, "Appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make;" but this and the absence of any provision respecting the mode of trial in the civil actions were so generally regarded as endangering the right of trial by jury as existing at common law, and evoked so much criticism on that ground, that the first Congress proposed to the legislatures of the

> **several states the 7th Amendment, which was promptly ratified.**

***Slocum v. New York Life Ins. Co.***, 228 U.S. 364 (1913), at 377.

*Galloway* makes it plain that a judge's decision of a patently clear factual question in a jury case violates the Seventh Amendment.

Here the Circuit Court has tried a factual question after a jury has already decided it as one in their proper domain. This the Seventh Amendment forbids.

With this said, we return to the Circuit Court's disposition of the case, (*with our brackets*) 860 F.2d 645 (App. A, *infra*, 16a):

> **Instructions which appear to impose operational control over a contractor's activities are at times more appropriately characterized as a principal's shorthand way of designating a desired outcome. [*Patently a jury question.*] Language itself is not dispositive. Rather, such instructions must be analyzed in the context in which they are imparted. *[Patently a jury question.]* Having viewed the evidence as a whole, we conclude that Patterson's directions merely designated the type of test to be conducted rather than the method to conduct it. *[Patently a jury question. Patterson ordered "maximum torque, weepholes closed."]* As a matter of law, the instructions did not constitute operational control over the testing procedure. *[Patently a jury question.]* We hold that the district court erred**

**in denying Patterson's motion for judgment notwithstanding the verdict on the issue of operation control.**

This belongs nowhere but in a jury room, whether it is an argument of fact or a mixture of fact and law. It violates Grammer's rights under the Seventh Amendment; since the NOV was at appellate level, he has no other court but this one to turn to; he asks that his rights be restored by reinstatement of the verdict.

II. The refusal to grant Grammer a new trial was also a violation of his right to trial by jury under the Seventh Amendment. It conflicts with the decision of this Court in ***Neely v. Martin K. Eby Construction Co.***, 386 U.S. 317 (1967), and with Rule 50(d).

Grammer was denied the new trial he requested as an alternative to reinstatement of his verdict. (His request was lodged in his petition for rehearing in the District Court (App. C, *infra*); his motion to recall and amend its mandate (App. D, *infra*); and in District Court (App. E, *infra*)). This denied him his constitutional right to trial by jury. ***Slocum v. N. Y. Life Ins. Co.***, 228 U.S. 364 (1913); ***Cone v. West Virginia Pulp & Paper Co.***, 330 U.S. 212 (1947); ***Neely v. Martin K. Eby Construction Co.***, 386 U.S. 317 (1967).

If warning which is actually brought home, is a necessary element of his cause of action (somebody walking up to Patterson, telling it that its orders created a grave danger), this is the first case for it. Before now, the rule was that a principal who exercises operational control has a duty to discover and remedy hazards created by acts of independent contractors in carrying those orders out.

The Circuit Court's own case of *Hawkins*, above, is a ruling case that a reasonable and prudent litigant would and could rely upon for the interpretation that operational control carries with it a duty to discover and remedy hazards.

Grammer proved his case on such a theory. He met his burden on *every* element of the case required of him by the *District* Court. It was not until the Circuit Court's NOV that he was aware of such a novel, additional requirement, or had any reason to be. The truly melancholy aspect is that almost the same day the Circuit Court insisted that Grammer had to prove a warning brought home to Patterson, a Louisiana appellate court was finding that implied authority to do work in a dangerous way occurred because the principal did not say anything, *neither orders nor warning*, to the contractor; ***Thompson v. Petrounited Terminals, Inc.***, 536 So.2d 504 (La.App. 1st Cir., November 22, 1988), at page 515, certiorari denied 537 So.2d 212:

> **We further find that the unsafe methods used by Serv-Tech [the independent contractor] were impliedly authorized by Petro [the principal] by their [Petro's] failure to provide any guidelines on tank entry and cleaning, their failure to discuss and approve the methods used by Serv-Tech, and their failure to monitor the activities of Serv-Tech.**

Hardly a year before, the Fifth Circuit had approved judgment against Patterson's counterpart without any requirement of express warning whatsoever:

> **Bartholomew testified that the reason the rig floor was wet and muddy [causing him to fall] was because the CNG "company man," J. T. Madison [the principal], whom Bartholomew**

> **referred to as "Mad Dog," had instructed the driller, Gill, not to stop the drilling operation to wash off the floor, but to do so afterwards. * * * Bartholomew also testified that the driller was fearful for his job. As a floorhand, Bartholomew took his orders directly from the driller.**

Bartholomew and Grammer are one and the same, as are CNG and Patterson; no mention at all of any warning or knowledge or continuous supervision, none whatsoever.

Suppose that the appellate courts have required in the past substantial proof of only Elements A, B, and C for recovery. Grammer proves these, but now the Circuit Court informs him that to recover he must not only prove them, but also X.

Should he not be entitled to a new trial so that he can prove up his entire case, including this new X that he was unaware of until he got the Circuit Court's decision?

The composite effect of the foregoing decisions of this Court would appear to be that Grammer has a constitutional right to remand for new trial. Not simply dismissal before he has a chance to prove up this new element X. (There was certainly no X in the ***Thompson*** case, immediately above, hardly an A, B, C.)

Since Grammer sought the alternative of a new trial in his peitition for rehearing, ***Neely v. Martin K. Eby Construction Co.***, 386 U.S. 317, clearly entitles him to one. Certainly the denial was an abuse of discretion.

This so, on the basis of Rule 50(d), stating that after appellate NOV nothing prevents the Circuit Court from awarding new trial or sending the case back down for a ruling

on new trial; on the basis of the case law; and on the basis of the Seventh Amendment, Grammer should have at least a new trial.

## CONCLUSION

For these reasons this petition for certiorari should be granted.

Respectfully submitted,

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# APPENDIX

No. _____

# IN THE
# Supreme Court of the United States

OCTOBER TERM, 1988

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WILLIAM GRAMMER,

*Petitioner*

v.

PATTERSON SERVICES, INC.,

*Respondent*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

**APPENDIX TO WRIT OF CERTIORARI**

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**WILLIAM GRAMMER**


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# APPENDIX A

## Opinion of the U.S. Fifth Circuit Court of Appeals

# APPENDIX A

## Opinion of the U.S. Fifth Circuit Court of Appeals

**WILLIAM E. GRAMMER,**
**Plaintiff-Appellee,**

**Insurance Company of North America**
**and Boco of Lafayette, Inc.,**
**Intervenors-Appellees,**

**and Home Indemnity Company,**
**Intervenor-Appellee,**

**v.**

**PATTERSON SERVICES, INC.,**
**Defendant-Appellant,**

**v.**

**GATOR HAWK, INC.,**
**Defendant-Appellee,**

**Home Insurance Company, Third Party**
**Defendant-Appellant.**

**No. 88 - 4115.**

United States Court of Appeals,
Fifth Circuit.

Nov. 23, 1988.
Rehearing Denied Dec. 29, 1988.

Worker borrowed from employer by independent contractor brought action against independent contractor and principal for which contractor worked, for injuries suffered during pipe testing procedure conducted by contractor, alleging strict liability and general negligence. Employer and its compensation carrier intervened to recover medical expenses and worker's compensation benefits paid and to be paid worker, naming contractor, principal, and contractor's compensation carrier as defendants in third-party action. After summary judgment was granted for contractor and directed verdict was granted for principal on strict liability claim, the United States District Court for the Western District of Louisiana, at Lafayette-Opelousas, Nauman S. Scott, J., entered judgment on jury verdict against principal on negligence claim and granted intervening employer and its carrier contribution from contractor's carrier. On appeals, the Court of Appeals, Thornberry, Circuit Judge, held that: (1) under Louisiana law, directed verdict in principal's favor on strict liability claim on theory machine involved in injuries was not in principal's custody did not entitle principal to verdict on negligence claim on theory principal did not have operational control over pipe testing procedure; (2) instructions given by principal to contractor to maximize torque of machine during pipe testing procedure did not amount to operational control over pipe testing procedure, so as to support imposing liability on principal under Louisiana's general negligence statute; and (3) assuming that Louisiana Worker's compensation Act section limiting time for bringing claims governed contribution claims for worker's compensation payment, claim of injured worker's employer and its carrier for contribution from contractor's carrier still had not prescribed.

Reversed in part; affirmed in part.

1. **Master and Servant KEY 318(1)**

Under Louisiana law, trial court's directed verdict in favor of principal on strict liability claim of worker injured while working for independent contractor on theory machine which caused injury was not in custody of principal did not entitle principal to verdict on general negligence claim of worker on theory principal lacked operational control over pipe testing procedure during which worker was injured; supervision and control under strict liability statute was not synonymous with operational control that would support imposing liability on principal under general negligence statute. LSA-C.C. arts. 2315, 2317.

2. **Master and Servant KEY 318(1)**

Instructions given by principal to independent contractor, to maximize torque of machine used in pipe testing procedure, did not amount to operational control over pipe testing procedure, so as to support imposing liability on principal under Louisiana's general negligence statute for injury to worker hired by independent contractor when worker was injured during pipe testing procedure; instructions principal gave contractor were merely designed to prescribe alterations in type of test ordinarily conducted by contractor and did not prohibit contractor from being free to do work in its own way. LSA-C.C. art. 2315.

3. **Limitation of Actions KEY 49(6)**

Assuming that Louisiana Worker's Compensation Act section limiting time for bringing claims governed contribution claims for worker's compensation payment, claim of injured worker's employer and its compensation carrier for contribution from borrowing employer's compensation carrier still had not prescribed, where employer and insurer

made payments for injured worker's medical expenses and worker's compensation benefits from date of injury that occurred while worker had been borrowed to date of trial; Act section provides that if payments are made prescription period will not commence until payments cease. LSA-R.S. 23:1209.

---

Joseph Waitz, Houma, La., for Patterson Services, Inc.

James H. Gibson, Lafayette, La., for Home Ins. Co.

Bob F. Wright, Philip S. Aucoin, Jr., Lafayette La., for Grammer.

Steven B. Rabalais, Lafayette, La., for Ins. Co. of North America.

James H. Gibson, Lafayette, La., for Home Indem. Co. and Gator Hawk, Inc.

Appeals from the United States District Court for the Western District of Louisiana.

Before THORNBERRY, RUBIN, and HIGGINBOTHAM, Circuit Judges.

THORNBERRY, Circuit Judge:

In this dispute involving a principal's liability for the activities of its independent contractor, defendant-appellant Patterson Services, Inc. (Patterson) appeals the district court's judgment based upon a jury verdict. Also on appeal, third-party defendant-appellant Home Insurance Company attacks that part of the judgment granting intervenors Boco

of Lafayette, Inc. (Boco) and Insurance Company of North America the right of contribution for one-half of all worker's compensation benefits and medical expenses paid or to be paid to plaintiff-appellee William Grammer. We reverse the judgment insofar as it imposes liability on Patterson and affirm that part of the judgment entitling Boco and Insurance Company of North America to partial contribution.

## I. Background

### A. Facts

Patterson is in the business of leasing oilfield pipeline to drillers. Before delivering pipe to lessees, Patterson tests each joint (piece) to ensure it can withstand the anticipated pressures encountered while conducting downhole drilling operations. Not in the business of pipe testing itself, Patterson contracts with independent contractors to conduct such inspections. During the period pertinent to our review, Patterson had entered into a lease agreement with Gator Hawk, Inc. (Gator Hawk) by which Gator Hawk agreed to bring its Automatic Hydrostatic Internal Tester (the AHIT machine) to Patterson's yard in Morgan City, Louisiana where Gator Hawk crews would conduct the testing procedure. Although remaining in possession of the AHIT machine, Gator Hawk agreed to travel to Morgan City at Patterson's request to operate and maintain the machine and "to provide such labor, supplies and other services . . . as may be required by Lessee from time to time." Pl. Ex. No. 2, p. 2.

Mr. Grammer was an employee of Boco, a company that furnished labor crews for hire. Typically, when Patterson needed pipe tested, Gator Hawk hired laborers from Boco to assist the Gator Hawk machine operator. In response to Patterson's request to conduct pipe testing on November

4th and 5th, 1981, Gator Hawk provided a three man crew consisting of its own operator, Donnie Castille, and two Boco laborers one of whom was Mr. Grammer. While conducting hydrostatic testing on November 5, 1981, a joint of pipe ruptured in the AHIT machine. The ruptured pipe discharged highly pressurized fluid that struck Grammer's face and catapulted him some distance. Mr. Grammer sustained injuries from this incident.

Mr. Grammer brought this tort action against Gator Hawk and Patterson in the United States District Court for the Western District of Louisiana alleging theories of strict liability and general negligence. The district court granted summary judgment for Gator Hawk holding it immune from the tort action and limiting its liability as a "statutory employer" to worker's compensation benefits and medical expenses. The court granted Patterson's motion for directed verdict on the issue of strict liability, but denied the motion as it related to the general negligence claim. The district court submitted the issue of Patterson's negligence to the jury which returned a verdict in favor of Mr. Grammer. Grammer was awarded $570,000 in damages, less ten percent attributable to his own contributory negligence.

B. Applicable Law

Under Louisiana law governing this diversity case, the well settled general rule is that a principal is not liable for the offenses of its independent contractor committed while performing duties under a contract. *Bartholomew v. CNG Producing Co.*, 832 F.2d 326, 329 (5th Cir.1987); *Ainsworth v. Shell Offshore, Inc.*, 829 F.2d 548, 549 (5th Cir.1987); *Hawkins v. Evans Cooperage Co., Inc.*, 766 F.2d 904, 906 (5th Cir.1985); *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 437 (5th Cir.1984). Equally well settled are the two exceptions to this general rule. First, a principal cannot escape

liability for injuries resulting from an ultrahazardous activity by hiring out the work to an independent contractor. On appeal, Grammer has not challenged the district court's determination that hydrostatic pipe testing does not constitute an ultrahazardous activity; therefore, we need not address this exception. Under the second exception, a principal may be liable for the acts of its independent contractor "over which it has excercised operational control or which it has expressly or impliedly authorized." *Hawkins*, 766 F.2d at 906.

Guided by the second exception, the district court instructed the jury that if it found Patterson had exercised operational control over the pipe testing procedure, Patterson would have owed Grammer a duty of care, the breach of which would form the basis of liability under Louisiana's general negligence statute. La.Civ.Code Ann. art. 2315 (West Supp.1988). On appeal, Patterson advances two arguments challenging the propriety of the jury instruction as it pertained to the issue of operational control. First, Patterson asserts the district court's directed verdict dismissing Grammer's strict liability claim should have disposed of the negligence claim. Second, Patterson argues the evidence adduced at trial is insufficient as a matter of law to establish a jury question on the issue of operational control.

## II. Dismissal of the Strict Liability Claim

[1] At trial, Grammer first asserted a theory for recovery based on Louisiana's strict liability statute which imposes liability on persons for "the damage occasioned by . . . the things we have in our custody." La.Civ.Code Ann. art. 2317 (West 1979). " 'Custody' in this article means supervision and control." *Ainsworth*, 829 F.2d at 551

(citing *Steele v. Helmerich & Payne Int'l Drilling Co.*, 738 F.2d 703, 707 (5th Cir.1984) and *Colleps v. State Farm Gen. Ins. Co.*, 446 So.2d 988 (La.Ct.App.1984)). Finding no evidence that Gator Hawk turned over the control, operation, or possession of the AHIT machine to Patterson, the district court concluded that the AHIT machine was not in Patterson's custody and therefore granted Patterson's motion for directed verdict on Grammer's strict liability claim.

Patterson contends that once the district court found Patterson lacked custody or "supervision and control" over the AHIT machine, it was error to instruct the jury on the issue of operational control. Essentially Patterson argues "supervision and control" under article 2317 is synonymous with "operational control." We reject this purely semantic argument.

"Supervision and control" arises in a context wholly unrelated to that involving operational control. The term "supervision and control" represents a judicial reformulation of the term "custody" which appears in article 2317. This article imposes strict liability on persons having custody or "supervision and control" *over things* which cause damage. By contrast, operational control, as discussed more fully below, refers to control *over the manner and method of operating* things. While one person may simultaneously control and supervise the thing itself and control the operation of the thing, we find these responsibilities distinct and their occasional confluence merely fortuitous. With this finding, we conclude that the district court's directed verdict in Patterson's favor on the strict liability claim did not vitiate the general negligence claim.

## III. Sufficiency of the Evidence Regarding Operational Control

### A. Standard of Review

Patterson's primary argument on appeal is that the evidence presented at trial was insufficient as a matter of law to engender a jury question on the issue of Patterson's operational control over the pipe testing procedure. Therefore, Patterson contends, the district court erred in denying its motions for directed verdict and judgment notwithstanding the verdict. The motion for judgment notwithstanding the verdict was properly before the district court since Patterson's motion for directed verdict on the same ground had been denied. Fed.R.Civ.P. 50(b); *Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223, 1227-28 (5th Cir.1988).

Our review of evidentiary sufficiency is governed by the well established standard in this Circuit:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of the one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach

> different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

*Boeing v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969) (en banc); *McCormack v. Noble Drilling Corp.*, 608 F.2d 169, 171-72 (5th Cir.1979); *Hawkins*, 766 F.2d at 907. Applying the *Boeing* standard, we hold the evidence on operational control insufficient to create a jury question and find error in the district court's refusal to grant Patterson's motion for judgment notwithstanding the verdict on this claim.

B. Patterson's Instructions

[2] Grammer asserts that certain instructions given by Patterson to Gator Hawk constituted operational control over the pipe testing procedure. Whether Patterson's instructions constituted operational control requires an understanding of the testing procedure and the specific context in which the instructions were given.

Each pipe joint consisted of a male and female end; both male and female ends had three threads or seals that, during downhole drilling, were screwed into other pipe ends to create a string of pipe. The objective of the testing procedure was to ensure that (1) the seals were strong enough to withstand the weight of the pipe string and (2) the body of the pipe could withstand anticipated downhole pressures. Gator Hawk's AHIT machine was designed to test both pipe seals (threads) and body.

As mentioned, Gator Hawk retained possession of the AHIT machine despite having leased it to Patterson, and, at Patterson's request, transported the AHIT machine to

Patterson's yard in Morgan City where Gator Hawk examined the pipe. Donnie Castille, Gator Hawk's operator of the AHIT machine, testified that the standard testing routine occurred as follows: After placing the AHIT machine next to a stack of pipe to be tested, the arms of the machine would *automatically* roll a joint of pipe into position on the machine. Plugs on each end of the thirty foot machine would screw onto the ends of the pipe and, in doing so, engage the pipe's outermost or primary seal. Only ten percent of the pipe's maximum torque make up was required for the plug to engage the pipe's primary seal. In this case, since the particular type of pipe was able to withstand torque of approximately three thousand foot-pounds, Gator Hawk normally torqued the plugs ten percent or up to three hundred foot-pounds. "Torque" as used here simply refers to the measure of force used to screw the plugs onto the pipe ends. The greater the torque, the tighter the plug-pipe connection.

Once the AHIT machine tightened its plugs onto the pipe ends, the machine operator gradually injected highly pressurized water into the the body of the pipe. After approximately twenty seconds, the water pressure reached the recommended testing level of 18,000 pounds per square inch (psi) at which time the operator held the pressure constant for an additional five seconds. The pipe failed the inspection if either (1) the body or walls of the pipe ruptured under the stress of the water pressure, or (2) the primary seal failed to contain the pressurized water. If the latter occurred, water leaking from the primary seal would escape from a valve in the plug called a "weephole." After holding the pressure constant at 18,000 psi for five seconds, the operator slowly released the pressure. The AHIT machine, if functioning properly, would then *automatically* unscrew its plugs from the pipe and prepare to roll the next piece into testing position.

Some months before Grammer's injury, a Gator Hawk testing session of Patterson's pipe resulted in a particularly high rejection rate due to faulty primary seals. It was at this time that, upon questioning the machine operation, Patterson first learned about the AHIT machine's technical operations including the standard practice of torquing the plugs only to the extent necessary to engage the primary seal. To improve their pass rate, Patterson instructed Donnie Castille, the operator, to maximize the AHIT machine's torque which had the effect of tightening the plugs onto the pipe ends to a greater degree thereby engaging the second and third seals in addition to the primary seal. The escape valves or weepholes in the plugs rendered it physically impossible to torque the plugs beyond the primary seal; therefore, Patterson instructed Gator Hawk to remove the weepholes so the AHIT machine's maximum torque could be utilized.

Although hotly contested by the parties, the reason underlying Patterson's request to maximize torque seems clear. Patterson needed to devise a test less stringent than Gator Hawk's normal procedure so that more of its pipe would pass the test. By maximizing torque and engaging all three seals, defects in the primary seal were less likely to surface; consequently, more pipe passed the inspection leaving Patterson with a larger leasable inventory.

On November 4th and 5th, 1981, Patterson's pipe tested extremely poorly. Based on the instructions given months before, Donnie Castille began torquing the AHIT machine's plugs beyond the pipe's primary seals. Because the plugs were connected so tightly to the pipe ends, the AHIT machine was unable to automatically disengage the plugs after the joint had been tested. Donnie Castille instructed Grammer to assist the disengaging process by placing a wrench on the pipe to secure it while the machine "backed off" the plugs. On November 5th, Grammer approached the

AHIT machine to apply the wrench a few seconds before the water pressure had been released. The pipe ruptured spewing highly pressurized water into Grammer's face.

On appeal, Grammer's sole assertion is that Patterson's instructions to torque the AHIT machine to its maximum and to remove the plugs' weepholes to accomplish maximum torque rose to the level of operational control over the testing procedure.

The term "operational control" as employed by this Circuit and Louisiana courts can be traced to the *Restatement* which provides in part that "[i]f the employer of an independent contractor retains control over the *operative detail of doing any part of the work*," he may be subject to liability for the offenses of his independent contractor. *Restatement (Second) of Torts* § 414 comment a (1965) (emphasis added). Section 414 further provides that

> [i]n order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough the he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, *or to prescribe alterations and deviations*. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right

> of supervision that the contractor is not entirely free to do the work in his own way.

*Id.*, comment c (emphasis added). Following § 414 we have consistently held that operational control does not arise unless the principal retains control over the methods and manner of performing the work. *Wallace*, 727 F.2d at 437 (indicating that the central issue germane to operational control is control over the manner of performance); *see Hawkins*, 766 F.2d at 908 (finding no operational control where principal failed to instruct the method of transport). A recent Louisiana case intimated that operational control only arises if the principal "exercise[s] direct supervision over the step-by-step process of accomplishing the work." *Guillory v. Conoco, Inc.*, 521 So.2d 1220, 1223 (La.Ct.App. 1988). After reviewing all the evidence, we conclude that Patterson's instructions to maximize torque and remove weepholes did not constitute operational control over the testing. Rather, these instructions were merely designed to prescribe alterations in the type of test ordinarily conducted by Gator Hawk.

As mentioned, only instructions designating "how to" conduct operations merit application of the operational control exception. Subject to an operative contract, it is wholly within the principal's province to specify that which an independent contractor is to accomplish. Viewing Patterson's instructions in light of all the evidence, it is clear Patterson simply wanted Gator Hawk to conduct a less stringent test to remedy the high rejection rate. It is unlikely Patterson intended to substitute its own lack of experience in conducting dangerous pipe testing for Gator Hawk's expertise.

We realize that, if viewed completely detached from the appropriate context, Patterson's instructions may be

construed as designating "how to" conduct the testing. However, in view of Patterson's need to devise a less stringent test and its apparent lack of experience in hydrostatically testing pipe, the instruction to maximize torque seems no more than its way of articulating alterations in Gator Hawk's normal test. Had Patterson employed language that simply designated the desired test–such as "test all three seals"–instead of its instruction to "maximize torque," we doubt an issue of operational control would have arisen. Having found that Grammer's claim largely hinges on the dubious distinction between an instruction to "maximize torque" and one to "test all three seals, " we decline to impose liability for a mere hapless use of language.

Citing this court's decision in *Wallace*, Grammer insists that Patterson's instructions prohibited Gator Hawk from being "entirely free to do the work in his own way" and thereby rose to the level of operational control. We disagree. Certainly, Gator Hawk was not free to do any work it wished. Patterson's instructions expressly designated a new, possibly substandard test which reflected a variation in Gator Hawk's normal test. Gator Hawk was bound by the lease agreement to perform this additional service. However, Gator Hawk was free to, and did, conduct the testing *in its own way*. No evidence suggests Patterson designated how the Gator Hawk crew was to stack the pipe, inject water pressure, or engage and disengage pipe from the AHIT machine. Rather, it is uncontroverted that Gator Hawk's Donnie Castille instructed Grammer on all matters including the use of the wrench to loosen the plugs from the pipe ends.

The evidence overwhelmingly indicates that Patterson personnel participated to a very limited extent in the testing proceedure. Michael Kern, the Patterson yard dispatcher, testified that Patterson personnel had been instructed to stay away from the testing area because it was a dangerous

procedure about which his men knew nothing. Donnie Castille testified that only he operated the machine and that "there were no Patterson hands working on this machine." The record is entirely devoid of any suggestion that Gator Hawk informed Patterson that the AHIT machine was unable to automatically disengage its plugs from the pipe ends or that Patterson knew the Gator Hawk crew was assisting this process by use of a hand held wrench. Thus, although not specifically raised by Grammer on appeal, this evidence nullifies any implicit contention that Patterson "expressly or impliedly authorized" or was aware of the dangerous activity.

Instructions which appear to impose operational control over a contractor's activities are at times more appropriately characterized as a principal's shorthand way of designating a desired outcome. Language itself is not dispositive. Rather, such instructions must be analyzed in the context in which they are imparted. Having viewed the evidence as a whole, we conclude that Patterson's directions merely designated the type of test to be conducted rather than the method to conduct it. As a matter of law, the instructions did not constitute operational control over the testing procedure. We hold that the district court erred in denying Patterson's motion for judgment notwithstanding the verdict on the issue of operation control.

## IV. Claim for Contribution

Boco and its compensation carrier Insurance Company of North America (INA) intervened in this action to recover medical expenses and worker's compensation benefits paid and to be paid to Mr. Grammer. This complaint, originally naming Gator Hawk and Patterson as defendants, was ultimately amended to include Gator Hawk's compensation carrier Home Insurance Company (Home). Due to Gator

Hawk's bankruptcy proceedings and our reversal of the judgment against Patterson, the sole remaining defendant in this intervention action is Home.

The district court, by way of summary judgment, concluded that Gator Hawk was Grammer's "borrowed employer" and that its insurer Home was liable for one-half of all medical expenses and worker's compensation benefits paid and to be paid to Grammer. On appeal, Home apparently concedes Gator Hawk's status as a "borrowing employer" but argues Boco and INA's claim for contribution prescribed.

[3] Home asserts that the prescription period governing a claim for contribution is based upon the underlying obligation binding the parties. Home's sole argument is that, since an action instituted by Grammer for compensation benefits would be governed by section 1209 of Louisiana Worker's Compensation Act, section 1209 controls Boco and INA's claim for contribution as well. Section 1209 provides in part:

> In case of personal injury, including death resulting therefrom, all claims for payments shall be forever barred unless within one year after the accident or death the parties have agreed upon the payments to made under this Chapter, or unless within one year after the accident a formal claim has been filed with the office as provided in this Chapter. *Where such payments have been made in any case, the limitation shall not take effect until the expiration of one year from the time of making the last payment*. . . .

La.Rev.Stat.Ann. § 23:1209 (West 1985) (emphasis added). We express doubt that section 1209 governs contribution

claims for worker's compensation payment, *see Employer's Liab. Assurance Corp., Ltd. v. Gen. Accident Fire and Life Assurance Corp., Ltd.*, 125 So.2d 689, 692-93 (La.Ct.App. 1960) (holding that a claim by an insurer against another insurer to recover worker's compensation payments is a claim for restitution governed by a ten year prescription period), but that issue need not be resolved at this juncture. Assuming *arguendo* that section 1209 applies as Home contends, we hold that Boco and INA's claim did not prescribe.

It is uncontested that Boco and INA made payments for Grammer's medical expenses and worker's compensation benefits from the date of his injury to the date of trial. Nevertheless, Home argues that since Boco and INA brought the claim for contribution more than one year after *instituting* such payments, section 1209 prescribes their claim. We find this argument meritless. Section 1209 clearly states that if payments are made, the prescription period will not commence until payments cease. Because Boco and INA continued to pay benefits, the event triggering the commencement of the section 1209's prescription period never occurred.

## V. Conclusion

For the foregoing reasons, we REVERSE the district court's judgment against Patterson Services, Inc. and AFFIRM the judgment against Home Insurance Co.

**WEST KEY NUMBER SYSTEM**

# APPENDIX B

## Opinion of the District Court

## APPENDIX B

### Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

CIVIL ACTION NO. 82-2640

(JUDGE SCOTT)

WILLIAM E. GRAMMER

-vs-

PATTERSON SERVICES, INC.

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
F I L E D
FEB 02 1988
ROBERT H. SHEMWELL, CLERK
BY s/s TLW
DEPUTY
*(stamp)*

## R U L I N G

Before us is defendant Patterson Services, Inc.'s Motion for Judgment Notwithstanding the Verdict, or alternatively, for a New Trial.

We deny defendant's motion. *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969); *National Car Rental System, Inc. v. Better Monkey Grip Co.*, 511 F.2d 724 (5th Cir.), *cert. denied*, 423 U.S. 894, 96 S.Ct. 193, 46 L.Ed.2d 126 and 423 U.S. 986, 96 S.Ct. 394, 46 L.Ed.2d 303 (1975).

Defendant presents a collection of exhortative arguments in support of its motion.

Defendant contends (1) We instructed the jury on the law for a principal who hires an independent contractor to perform work which is inherently or intrinsically dangerous, or ultrahazardous; and/or (2) We charged the jury that a principal always has a duty to supervise, or to ensure the safety of, employees of its independent contractor.

On the contrary, we charged the jury on one of the well-recognized exceptions to the rule of nonliability for the party who hires an independent contractor: A principal may be held liable for the acts of an independent contractor if he retains or exercises operational control over those acts, or expressly or impliedly authorizes an unsafe practice. *Bartholomew v. C.N.G. Producing Co.*, 832 F.2d 326 (5th Cir. 1987); *Ainsworth v. Shell Offshore*, 829 F.2d 548 (5th Cir. 1987); *Hawkins v. Evans Cooperage Co.*, 766 F.2d 904 (5th Cir. 1985); *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 437 (5th Cir. 1984); *Moser v. Texas Trailer Corp.*, 623 F.2d 1006, 1015 (5th Cir. 1980); *Williams v. Gervais F. Favrot Co.*, 499 So.2d 623 (La.App. 1986), *writ denied*, 503 So.2d 19 (La. 1987). We note that no mention or argument or inherently dangerous or ultrahazardous activity was made to the jury. Also, the jury was instructed not to "single out one instruction alone as stating the law" but to "consider the instructions as a whole." Instructions, 1; Transcript, 571-72. Furthermore, each member of the jury was given a copy of the instructions to follow while we gave the charge

and to use while deliberating. A copy of those instructions is attached to this Ruling. *See* Instructions, 6-9; Transcript, 578-582.

We directed a verdict for defendant on strict liability under Louisiana Civil Code article 2317 holding that defendant Patterson had not "exercised control as contemplated under 2317." Transcript, 513; *see* 509-13; Defendant's Memorandum, 7. Defendant insists that a party without control/custody for purposes of 2317 also lacks operational control sufficient "to pierce the general rule that the principal cannot be held liable." Defendant's Memorandum, 7. Control/custody (or *garde*) of a defective thing for 2317 liability is not synonymous with operational control for liability of a principal. *Ross v. La Coste de Monterville*, 502 So.2d 1026, 1032 (La. 1987) ("We do not embrace the French concept of *garde* of the conduct of an object . . . only the concept of *garde* of the structure of a thing is relevant to article 2317 strict liability theory").

Defendant contends that although our jury charge spoke of operational control, we directed defendant not to argue 'control' in closing argument. On the contrary, we did not preclude defendant from arguing control of Gator Hawk's operations. We ruled: "Let's don't say custody, just talk about control." Transcript, 554; Defendant's Memorandum, 24.

We did not give a charge on assumption of risk. Defendant has not cited us to a case which would have required such a charge. Instead, at trial, we referred to *Bell v. Jet Wheel Blast*, 462 So.2d 166 (La. 1985), as an indication of the movement in Louisiana jurisprudence toward a merger of 'common law' defenses into the scheme of comparative fault. *Id.* at 172. *See* Transcript, 518, 606. *See also*, D.

Robertson, *Ruminations on Comparative Fault, Duty - Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana*, 44 La. L. Rev. 1341 (1984). Furthermore, our charge to the jury on Louisiana's system of comparative fault, that is, on plaintiff's contributory negligence, encompassed the essentials of an assumption of the risk instruction. *See* Instructions, 9-13; Transcript, 583-88.

Defendant contends error in our Order dated October 23, 1987, quashing certain depositions. *See, e.g., Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 550 (5th Cir. 1980); *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186 (5th Cir. 1978). Defendant has still not justified its attempt to schedule, with only ten days notice, sixteen depositions in Peoria, Illinois, five days before trial and forty days after the deadline for all discovery, in a case filed five years ago.

Over defendant's objection we permitted Mr. George Green to testify as an expert. We are aware of our task to be "sensitive to the qualifications of persons claiming to be an expert." *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1233-34 (5th Cir. 1986). We have re-examined Mr. Green's qualifications and affirm our decision.

In particular, defendant claims prejudice from the following exchange it had with Mr. Green:

> Q: Were you informed on October 24, 1986, Gator Hawk was dismissed from the lawsuit?
>
> A: I don't know whether it was or not. I certainly would recommend they be dismissed. They certainly did nothing

> wrong. I was probably asked if I had any complaints against them and I told them no.

Transcript, 333; Defendant's Memorandum, 28. Defendant argues that this testimony was "not responsive to the question" and "invad[ed] the complete province of the jury." Defendant's Memorandum, 28-9. We are not convinced that the entire answer was unresponsive but even if not responsive, defendant asked the question and defendant failed to timely object after the answer. Furthermore, we have not been referred to, nor have we located in the transcript (nor do we recall), a request for a curative instruction on the answer. We do not believe that by this single answer the jury was compelled to abdicate its duty to reach an independent judgment. *See* Federal Rules of Evidence 103 and 704. Indeed, the jury was instructed to disregard an expert's opinion "entirely," if "you should conclude that the reasons given in support of the opinion are not sound, or the opinion is outweighed by other evidence . . . ." Instructions, 4; Transcript, 576.

We also disagree with defendant's assertion that there was insufficient evidence to justify a jury finding of defendant's operational control over Gator Hawk's work and that, regardless, any such control was a remote, not a proximate, cause of plaintiff's injuries and that therefore plaintiff's injuries could not have been the natural and probable consequence of defendant's actions. The jury could fairly conclude from all of the evidence that defendant's actions constituted operational control of Gator Hawk's pipe testing, and that defendant's actions were negligent and a proximate cause of plaintiff's injuries. Defendant never proposed or argued for a jury charge on remote cause, intervening cause, or superceding cause. Furthermore, we add that we did not, by our directed verdict on custody under La. C.C. art. 2317, also direct a verdict on causation.

Defendant's motion DENIED.

DONE AND SIGNED at Alexandria, Louisiana, this 2d day of February, 1988.

s/s Nauman S. Scott
UNITED STATES DISTRICT JUDGE

**COPY SENT**
**DATE 2-2-88**
**BY s/s TWB**
**TO Bethancourt, et al**
**Robison/Gibson**
**Gibson**
**Rabalais**
**Aucoin/**
**Brupbacher**
*(stamp)*

# APPENDIX C

## Request for New Trial

# APPENDIX C

## Request for New Trial

## FROM PETITION FOR REHEARING

"Therefore, failure to grant this rehearing and allow counsel for plaintiff to point out misapprehensions of law and factual errors made in the court's decision effectively denies Grammer his right to a trial by jury. This court will in effect be telling Grammer that his right to a trial by jury of his peers is not recognized or protected by the United States Court of Appeals for the Fifth Circuit.

* * *

Finally and in the alternative plaintiff respectfully requests that this Honorable Court remand this case to the District Court for a new trial on the merits."

# APPENDIX D

## Circuit Court's Order Denying New Trial

## APPENDIX D

Circuit Court's Order Denying New Trial

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88 - 4115

WILLIAM E. GRAMMER,
Plaintiff-Appellee,

INSURANCE COMPANY OF NORTH AMERICA
and BOCO OF LAFAYETTE, INC.,
Intervenors-Appellees

HOME INDEMNITY COMPANY,
Intervenor-Appellee,

versus

PATTERSON SERVICES, INC.,
Defendant-Third Party
Plaintiff-Appellant,

versus

GATOR HAWK, INC.,
Defendant-Appellee,

HOME INSURANCE COMPANY,
Third Party Defendant-Appellant.

U.S. COURT OF APPEALS
F I L E D
MAR 28 1989
GILBERT F. GANUCHEAU
CLERK
*(stamp)*

**Appeals from the United States District Court for the Western District of Louisiana**

Before THORNBERRY, RUBIN and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee, William E. Grammer, to recall mandate is DENIED.

IT IS FURTHER ORDERED that the motion of William E. Grammer to remand case for new trial, or to direct the District Court to determine whether a new trial should be granted is DENIED.

ENTERED FOR THE COURT:

s/s ALVIN B. RUBIN
UNITED STATES CIRCUIT JUDGE

# APPENDIX E

## District Court's Refusal to Consider New Trial

## Because of Circuit Court's Denial

## APPENDIX E

District Court's Refusal to Consider New Trial
Because of Circuit Court's Denial

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 82-2640

(JUDGE SCOTT)

WILLIAM E. GRAMMER

-vs-

PATTERSON SERVICES, INC., ET AL

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
F I L E D
APR 05 1989
ROBERT H. SHEMWELL, CLERK
BY s/s TWB
DEPUTY
*(stamp)*

RULING

Pending before us for our consideration is a Motion for New Trial filed on March 9, 1989 by plaintiff William E. Grammer.

Also before us is the order of the United States Court of Appeals for the Fifth Circuit (No. 88-4115) dated March 28, 1989 ordering as follows:

> IT IS ORDERED that the motion of appellee, William E. Grammer, to recall mandate is DENIED.
>
> IT IS FURTHER ORDERED that the motion of William E. Grammer to remand case for new trial, or to direct the District Court to determine whether a new trial should be granted is DENIED.

Considering the order of March 28, 1989 we refuse to consider plaintiff's Motion for New Trial filed in this court on March 9, 1989.

DONE AND SIGNED at Alexandria, Louisiana, this 4th day of April, 1989.

s/s Nauman S. Scott
UNITED STATES DISTRICT JUDGE

**COPY SENT**
**DATE 4-5-89**
**BY s/s TWB**
**TO Bethancourt, et al**
**Robison/Gibson**
**Gibson**
**Rabalais**
**Wright, et al**
*(stamp)*